**CHAN WAI-KEUNG**

**v.**

**THE QUEEN**

PRIVY COUNCIL
LORD MUSTILL, LORD KEITH OF KINKEL, LORD WOOLF,
LORD LLOYD OF BERWICK & LORD NICHOLLS OF BIRKENHEAD
[PRIVY COUNCIL APPEAL NO. 32 OF 1994]
13 DECEMBER 1994

***CRIMINAL LAW & PROCEDURE****: Charge of murder - Propriety of trial - Whether accused subjected to unfair trial - Witness awaiting sentence in separate case promised discounted sentence to testify against accused - Whether in accordance with the law - Whether promise amounted to incentive for witness to concoct story such that jury could not safely rely on his evidence - Whether jury properly addressed.*

This was an appeal by the appellant against the decision of the Hong Kong Court of Appeal, affirming his conviction for murder and the sentence of death passed against him. The appeal was centred on the argument that the calling by the Crown of a witness, one Yap Wai-Sheung (Yip), to give evidence at a time when he was awaiting sentence for an unrelated offence, in the knowledge that his evidence for the Crown might lead to favourable treatment, was so objectionable in principle that a conviction founded on that evidence could not be allowed to stand, and ought to be quashed.

The facts showed that at the trial of the appellant below, in order to induce Yip to testify against the appellant, the Crown had promised Yip with a lighter sentence in respect of a pending drug case, for which he was then awaiting sentence. Before the Judicial Committee, the appellant argued that the circumstances of the promise gave Yip so much of an incentive for making up a false story that the jury could not safely rely on his evidence, and therefore, it was unsafe to convict the appellant. The Crown, on the other hand, contended that such conduct was lawful and had not in any way vitiated the trial. While agreeing that whatever reliance that was to be placed on the evidence of Yip, if any, was a matter for the jury to decide, the Crown maintained that the prosecution had in fact fully laid before the jury the possibility that Yip might have concocted the entire story under the inducement of a lighter sentence, and hence there was nothing upon which it could be said that the appellant was prejudiced by the trial, or that the trial was unfair, or that the jury was misled by Yip's evidence, thereby vitiating the trial. In the premises the trial was perfectly regular, and so was the conviction.

The primary issue that arose was whether, given that Yip was awaiting sentence in circumstances where he knew that, at the very least, he stood a chance of having his sentence reduced if he gave evidence at the trial of the appellant, it was *ipso facto* a denial of justice for the trial Judge to allow him to give evidence.

**Held:**

**[1]** The practice of allowing one co-accused to "turn Queen's evidence" and obtain an immunity from further process by giving evidence against another, has been recognised by the Courts as a powerful weapon for bringing criminals to justice. Although it brings with it an obvious risk that the accused will give false evidence under this "most powerful inducement", this practice has been accepted as being in accordance with the law. The logic of this practice, which places the interests of the public in the detection and punishment of

crime above the risk which must always exist where a witness gives evidence for the prosecution in the hope that he will obtain a benefit thereby, must also apply to situations where the "powerful inducement" takes the shape not of promised immunity from prosecution, but of the expectation that he will be granted a "discount" from sentence which the Courts accord to those who give evidence against their co-accused.

**[2]** Once the Courts have taken the large step, as they undoubtedly have, of recognising that circumstances may justify the calling of a witness who stands to gain by giving false evidence, it becomes impossible to say that what happened in the present case was contrary to the proper conduct of the murder trial. It seems that in the circumstances what was required was that the potential fallibility of Yip's evidence should be put squarely before the jury, and this is what was done here.

**[3]** The sentencing of Yip, with all the inevitable publicity, before the trial of the appellant was complete, was an unsatisfactory feature of the murder trial. Knowledge that a substantial discount had actually been made might tend to point the jury in the wrong direction. The acknowledgement by the trial Judge in the drug case that Yip had given help in the murder trial of the appellant might also lead an uncautious jury to suppose that the Judge therein had accepted Yip's evidence in the appellant's trial to be full and true. Nevertheless although the sentencing of Yip at this crucial moment should not have been allowed to happen, the misunderstandings which might have ensued were capable of remedy by a clear and firm summing-up. This is what the trial Judge in the appellant's trial furnished and as such no substantial injustice has been suffered.

**[4]** Having examined the record of trial with particular care, their Lordships can find no unfairness, under whatever legal formula it might be described, as would justify their intervention. The considerations which put Yip's veracity in doubt were fully exposed throughout his evidence, the closing addresses of Counsel, and the direction to the jury. At the same time the learned Judge reminded the jury of a cardinal feature of Yip's evidence. What if any reliance was to be placed on the evidence of Yip in all these circumstances was a matter for the jury to decide. The appellant had suffered in no way from the absence of an application to the Judge to stop the trial, since the right course would have been to reject the application and leave the case to the jury.

*[Appeal dismissed]*

**Case referred to:**

*Scott v. The Queen [1989]1 AC 1242 at p. 1257* ***(refd)***
*R. v. Sang [1980] AC 402, at p. 445* ***(refd)***
*Hui Chi-ming v. The Queen [1992]1 AC 34* ***(refd)***
*R. v. Payne [1950] 34 Cr. App. R. 43* ***(refd)***
*R. v. Turner (Bryan) [1975] 61 Cr. App.R. 67, 79* ***(foll)***
*R. v. Davies (Leroy) [1978] 68 Cr. App. R.319* ***(refd)***
*Sivan [1988] 10 Cr. App. R. (S) 282* ***(refd)***
*R. v. Sze Tak-hung [1991]1 HKLR 109* ***(foll)***
*R. v. Pipe [1966] 61 Cr. App. R. 67* ***(refd)***
*R. v. Weekes [1980] 74 Cr. App. R. 161* ***(refd)***
*R. v. Palmer, 20 August 1993 [1993] TLR 481* ***(refd)***
*Debbag and Izzet [1991]12 Cr. App. R. (S). 733* ***(refd)***
*re X [1994] Crim. LR 469 (Court of Appeal 93/3316/Y4)* ***(refd)***

**JUDGMENT**

**Lord Mustill:**

This appeal concerns the relationship between two concurrent sets of criminal proceedings in the Court of Hong Kong. At the conclusion of the first Chan Wai-Keung was convicted of the murder of Leung Ka-Po and was sentenced to death. After unsuccessful recourse to the Court of Appeal of Hong Kong (Yang CJ, Power JA and Barnett J) he now appeals by special leave to Her Majesty in Council. The second set of proceedings culminated in the conviction of Yip Wai-Sheung and two co-defendants on charges of conspiring to traffic in a dangerous drug and his sentence to a term of imprisonment for 18 years. These otherwise separate criminal processes were linked by the fact that Yip Wai-Sheung was a witness for the prosecution at the trial of the present appellant on the charge of murder.

It is convenient to begin by describing separately the major event in relation to the two trials. Taking the offence of murder first, Leung Ka-Po was stabbed to death in the early hours of 21 February 1990. There were two eye-witnesses, but no identification was possible. Of the fact of murder there could be no doubt. The only issue at the trial was whether the appellant was the person responsible. Soon after the murder the appellant left Hong Kong for mainland China. On the following day a man named Cheung Kwok-Kei made a statement to the police to the effect that the appellant had admitted to him before leaving for China that he had killed Leung Ka-Po. A few weeks later, Cheung retracted this statement, a retraction which he would later maintain at the trial of the appellant.

On 1 March 1990 the appellant returned voluntarily from China, and was arrested on arrival. Two days later the police made contact with Yip Wai-Sheung who made a statement. This was to the effect that at about 8.00 a.m. on the morning of the murder the appellant and he had met. At that time the appellant was wearing a bandage on his leg. He was asked whether he had seen any blood on the body of the appellant and replied that he had not. Continuing his statement he gave an account of how the appellant had told him he had killed someone whom he had left immobile on the ground. When Yip asked the appellant who this was, he was told (according to the statement) that he need not concern himself about this.

Some fourteen months later there began the trial of the appellant before Ryan J and a jury on the charge of murder. The prosecution encountered serious difficulties. An important part of the case against the appellant was a statement to the police which was said to contain a confession. This was challenged on the ground that it had been extracted by improper means, and after an extensive hearing on the *voir dire* the learned Judge ruled that it should not be put in evidence. When Cheung Kwok-Kei gave evidence he did not maintain the account given in his statement to the police that the appellant had confessed to killing someone. After these reverses, the evidence left to the prosecution was two-fold. First, a collection of circumstantial facts which cast suspicion on the appellant, but which (as Ryan J would later suggest to the jury) was insufficient on its own to establish his guilt. Secondly, the confession which, if the statement of Yip to the police was true, the appellant had made to him on the morning of the murder. Plainly, the evidence of Yip had become central to the trial of the appellant. The history of this evidence was as follows.

It appears that between April and June 1990, not very long after Yip had made his first statement to the police about the murder, he had been engaged in criminal activities in conjunction with at least two other persons. At the time when he made a further statement about the murder, during June of that year, these activities had not come to the knowledge of the authorities. On 22 February 1991, however, he was arrested and charged with conspiring

to traffic in heroin. The case evidently proceeded speedily, and the trial of Yip and his co-accused began before Gall J at about the beginning of May 1991, a few days before the appellant was to be tried on the charge of murder. On 9 May, just after the trial of the appellant had begun, and whilst it was standing adjourned for seven days, all three defendants were convicted in the other Court on the heroin charge. No doubt they would all have been sentenced at once, but for the arrival in Court of prosecuting Counsel (Mr. Cagney) in the murder case, who had a conversation with Counsel for Yip. The gist of this conversation was related by Yip's Counsel to the Judge as follows:

> It appears from the conversation I have had with Mr. Cagney that after conviction the defendant had shown some reluctance in coming forward to give evidence in that case. As a result Mr. Cagney has suggested perhaps sentence could be deferred so that after that case he will then be in a position to be armed with a letter or something to the effect to say how the defendant has done in that case. That may be used to a certain extent in mitigation in the present case ... the defendant ... is agreeable to having his sentence in this case deferred.

After some discussion Gall J decided to postpone the sentencing of Yip and one of the co-accused for one month. The remaining defendant did not wish for an adjournment and received an immediate sentence of 23 years' imprisonment. The appellant was not represented on these proceedings, and nobody on his side knew about them at the time.

On 15 May the appellant's trial resumed. It was not until nearly three weeks later that Yip was called to give evidence. In the meantime it had become clear that what he had to say would be of crucial importance, and the prosecuting authorities took steps to procure that he came forward to say it. Two visits, and possibly more, were made to Yip at the reception centre by police officers and an official of the attorney general's department, which culminated in the issuing to him of a written immunity on behalf of the attorney general. This contained an undertaking that "on the condition that you give full and true evidence in the trial against this accused Chan Wai Keung ..." no prosecution would be instituted against him for any offence of assisting offenders to escape prosecution or apprehension, or for being an accessory after the fact of the murder, or for wilfully making false statements knowing that they were to be used in Court; and that nothing said in his testimony about any other offence would be used against him. In reality it is hard to suppose that the authorities were seriously contemplating the prosecution of Yip for any offence of the first three types, but it was explained to their Lordships that the document was in common form.

It should also be mentioned that later in the trial evidence was given by a fellow inmate of Yip at the reception centre, Moa Ngan-Cheung, of a conversation in which Yip had told that he was awaiting sentence and that:

> ... if he came out to be a witness, then his cases would be dealt with lightly; otherwise if he did not come out to be a witness, then his case would be put in a heavier position ... if he did not lay his finger against [the appellant] and to do him in, then he himself would be put up as a boss. If he laid his finger and do him in, then perhaps he would be given capacity as a foki only.

According to Moa, Yip added that he was considering whether he should appear in Court, and would get a solicitor to come to him to talk about it. Yip wanted Moa to convey this information to the appellant, which he did.

Returning to the trial, Yip did appear and give evidence. At the outset prosecuting Counsel very properly brought out the existence and terms of the immunity, and also the fact that Yip was awaiting sentence. It was put to Yip, and he accepted, that if he gave full and true evidence the fact would be placed before the sentencing Judge, but that whether and if so

to what extent it was taken into account in sentencing would be for the Judge alone. Throughout his evidence he continued to insist that he did not know what reduction in sentence he might expect for giving evidence.

It is unnecessary to set out the contents of the evidence given by Yip, except to note a fact of which much was understandably made by the defence, namely that it contained two features absent from the statement which Yip had made to the police many months before his own arrest; first that when he met the appellant on the morning of the murder the appellant told him that he had been in a fight, and second that the bandage which the appellant was then wearing was freshly bloodstained. Unquestionably, if Yip was believed there was ample evidence to found a conviction, and Counsel for the defence naturally devoted much effort towards showing that he had told lies to obtain a reduction in sentence, just as he had told lies at this own trial in an unsuccessful attempt to avoid conviction.

Although the trial had originally been expected to last for about three weeks this estimate was exceeded, and there still remained that closing addresses of Counsel, the direction to the jury and the verdict by the time the four weeks' adjournment expired and Yip was due back before Gall J for sentence on the heroin charge. Realising this belatedly, the prosecution in the murder trial drafted for signature by the Director of Public Prosecutions a letter addressed to Gall J designed to honour the undertaking which had been given to Yip. This stated, in part:

> In consequence of other evidence being ruled inadmissible, Yip's evidence became in fact vital evidence upon which the viability of the Crown case almost wholly depended. Yip's statements to police and the events from which the murder trial arose, occurred before the events leading to the dangerous drugs case against him took place. In my respectful submission Yip has made a significant contribution in another important matter, and I ask you consider that fact in deciding his dangerous drug conviction.

This letter was read out by Counsel at the resumed hearing on 10 June and was expressly taken into account by Gall J in imposing a sentence of 18 years imprisonment (subsequently reduced on appeal to 17 years) by comparison with the 23 years received by the co-accused one month previously. In giving reasons for this sentence, and also for the lesser sentence of 11 years imprisonment imposed on the other co-accused, who had pleaded guilty and given evidence for the prosecution in the heroin case, the learned Judge expressed a hope that the message would go out that persons in a similar situation who came forward and gave evidence for the Crown would receive a far lesser sentence than they otherwise might. The message did go out, for the substance of what had happened was reported in the press the following day - the day on which the jury in the appellant's trial was to consider whether Yip's evidence could be relied upon.

After the addresses of Counsel and a conspicuously clear and fair direction by Ryan J the jury returned the unanimous verdict which is now before the board for consideration.

On these facts two distinct complaints were raised before the board. First, that the calling of Yip at a time when he was awaiting sentence for an unrelated offence in the knowledge that his evidence for the prosecution might lead to favourable treatment was so objectionable in principle that a conviction founded on that evidence could not be allowed to stand. Second, that even if the leading of evidence from a person in the position of Yip would not invariably by objectionable, there were special features of the procedures adopted in this individual case which took it over the line.

The argument based on general principle entails that the Judge should have intervened at the point when the evidence of Yip was tendered, either because the evidence though technically admissible should have been rejected on the ground that it would make the trial unfair (see the opinion of the board in *Scott v. The Queen* [1989]1 AC 1242 at p. 1257, citing the speech of Lord Salmon in *R. v. Sang* [1980] AC 402, at p. 445), in which event the case for the prosecution would have collapsed for want of a *prima facie* case; or because the trial could no longer be fair once the evidence had been led, and thus should be brought to an end as an abuse of process: see *Hui Chi-ming v. The Queen* [1992]1 AC 34, where the authorities are collected. The most immediately striking feature of his submission (for it is really a single submission, expressed in two different ways) is that the course which it is now suggested the Judge should have taken was never proposed to him at the time. At an earlier stage of the trial Counsel had vigorously and successfully opposed the admission of the appellant's own supposed confession to the police, and yet made no objection to the evidence of Yip's or to the continuation of the trial once his evidence had been admitted. The case for the appellant throughout was simply that the circumstances gave Yip so much of an incentive for making up a false story that the jury could not safely rely on what he said. Even on appeal, the point taken was not that the admission of the evidence made the whole trial objectionable, but rather that in the circumstances the Court of Appeal ought to treat the conviction as unsafe. This is not of course to say that an ultimate Court of appeal is powerless to interfere in the face of a real injustice even if no objection has been made at the proper time, but it is hard to overlook that the event now said to have made the proceedings so imbued with unfairness that they should be struck down as an abuse escaped the notice of Counsel and of the four Judges in Hong Kong who were seized of the case.

Nevertheless the issue has been raised and must be addressed. When doing so it is important to bear in mind that the contest is limited to the propriety of the trial in which the appellant was convicted. The decision of Gall J not to proceed immediately with the sentencing of Yip is not, and could not be, the subject of any direct complaint before the board in the present appeal, which concerns the murder trial alone. What is under attack is the adduction of evidence from Yip in the situation where he was still awaiting sentence, and the two cases are linked only by the special feature that the postponement was prompted by the direct intervention of Counsel who was prosecuting in the murder trial. Leaving this special feature aside for the moment, the question of principle is simply this - given that Yip was awaiting sentence in circumstances where he knew that at the very least he stood a chance of having his sentence reduced if he gave evidence at the trial of the appellant, was it *ipso facto* a denial of justice to allow him to give evidence at all?

When considering what should happen in a situation when, so far as Counsel have been able to ascertain, is not discussed in any reported case, various lines of authority must be considered. These are in origin wholly unrelated, although recently they have converged.

The first concerns the sentencing of co-accused and accomplices. Formerly, in the days of Assize, there were good practical reasons for setting some standards by imposing sentences at an early stage on those who pleaded guilty, whilst co-accused were maintaining pleas of not guilty. More recently however although the decision on whether to sentence before or after the trial of a co-accused remains, as it has always been, within the discretion of the Judge, it is usually thought better for the same Judge to sentence all the accused at the end of the trial, when he can best form an impression of the relative culpability of all those implicated, and avoid the discrepancies which can arise when one of the sentences is passed before the facts have been thoroughly explored: see *R. v. Payne* [1950] 34 Cr. App. R. 43 and many subsequent cases.

The second line of authority was originally quite distinct. It was been recognised for centuries that the practice of allowing one co-accused to "turn Queen's evidence" and obtain an immunity from further process by giving evidence against another was a powerful weapon for bringing criminals to justice, and although this practice "has been distasteful for at least 300 years to Judges, lawyers and members of the public", and although it brings with it an obvious risk that the accused will give false evidence under this "most powerful inducement", the same very experienced Court which so stigmatised this practice was willing to accept that it was in accordance with the law: *R. v. Turner (Bryan)* [1975] 61 Cr. App.R. 67, 79.

The logic of this practice, which places the interests of the public in the detection and punishment of crime above the risk which must always exist where a witness gives evidence for the prosecution in the hope that he will obtain a benefit thereby, must also apply to situations where the "powerful inducement" takes the shape not of a promised immunity from prosecution, but of the expectation that he will be granted the "discount" from sentence which the Courts accord to those who, not infrequently at physical risk, give evidence against their co-accused. This logic is carried into effect. No authority is needed to illustrate the widespread practice of calling as a witness for the prosecution a co-accused who has pleaded guilty.

The next step in this line of authority concerns the case where the witness is under threat or prosecution or sentence for offences different from that said to have been committed by the defendant against whom he gives evidence. The benefit to the public interest of having criminals detected and punished, and the risk of perjured evidence being given under an inducement is just the same as where one co-accused gives evidence against another, and one would expect the balance to be struck in the same way. This is what has happened. Some of the most conspicuous criminal informers have given information and evidence regarding crimes in which they were not personally concerned. The practice of conferring "discounts", often very large, in such circumstances, was firmly endorsed in *R. v. Davies (Leroy)* [1978] 68 Cr. App. R.319, and is as much a part of life in the Criminal Courts of England and Wales as it is in Hong Kong. What was referred to in *Sivan* [1988] 10 Cr. App. R. (S) 282 as the regrettable but unavoidable lack of openness which this may involve is a price to be paid for the benefits to the public obtained by using informers.

There is one more step. What should happen where the assistance to the authorities, whether taking the shape of information or evidence, is given after the accused has received an appropriate sentence for the crimes which he himself has committed? Previously, it was thought best to leave the recognition of this to the executive authorities, but the practice has now changed. The value of the assistance does not depend on when it is given, and it is desirable that its value should be publicly acknowledged, and publicly acted upon by a reduction in sentence on appeal, so that those who wish to reflect after sentence on how their predicament may be eased by belated co-operation can have confidence that it will be appropriately rewarded. Just such a development was discussed and approved by the Court of Appeal of Hong Kong in *R. v. Sze Tak-hung* [1991]1 HKLR 109.

How should these two lines of authority be drawn together? The problem will most frequently arise where a co-accused pleads guilty and is willing to give evidence. The discretion still remains whether to sentence at the beginning or the end of the trial. Formerly, the view was taken that sentence should not be postponed, in order to minimise the risk that the inducement would lead to perjury: see, for example, *R. v. Pipe* [1966] 61 Cr. App. R. 67. Latterly, the balance of risk has been differently assessed. It is now clear that there is no such rule of law as had for a time been thought to emanate from *R. v. Pipe*, and that the better practice

will often be to leave the sentencing of a co-accused or accomplice until all those pleading guilty or convicted are available to be sentenced together: *R. v. Weekes* [1980] 74 Cr. App. R. 161; *R. v. Palmer*, 20 August 1993 [1993] TLR 481. It is however clear from the explanations given by the Court of Appeal in the latter case that this practice is dependent on the risk of disparity, and not on any other reason. The problem in the present case is rather different, and has not arisen, or at least not so starkly, in any reported case to which attention has been drawn. As Mr. Martin Thomas Q.C. rightly points out the reasoning of even the most modern cases on the sentencing of co-accused cannot be applied to this situation, for no question of disparity could arise between the sentence of death on the appellant for one offence and a long sentence of imprisonment on Yip for one which was wholly unconnected. Put quite bluntly, the only reason why those prosecuting the appellant encouraged those defending Yip to ask for a postponement was to make sure that Yip came forward to give evidence. This being so, it was contended on behalf of the appellant that since the consideration of possible disparity, which prompted the change of practice from that which had been advocated in *R. v. Pipe*, did not apply in the present case, the risk of perjury under inducement should at least be reduced by putting the witness in a position where whatever he stood to gain had already been gained by the time he gave evidence. The response of the Crown was that credit could be given on appeal for assistance rendered after sentence, just as it would be at the time of sentence for assistance rendered beforehand: see *The Queen v. Sze Tak-hung* [1991]1 HKLR 109. Assuming that the prosecution honoured its promise to put the facts before the relevant Court, as it did, the credit for giving evidence would have been accorded to Yip whether he was sentenced before the murder trial, in which case the relevant Court would have been the Court of Appeal, or after, when it was the Court which had conducted his own trial. It may well be that the inducement would have been less cogent in the former case, but the principle is the same. Once the Courts have taken the large step, as they undoubtedly have, of recognising that circumstances may justify the calling of a witness who stands to gain by giving false evidence, it becomes impossible to say that what happened in the present case was necessarily contrary to the proper conduct of the murder trial. What was required was that the potential fallibility of Yip's evidence should be put squarely before the jury, and this is what was done.

Their Lordships pause to mention a question not fully discussed in argument. Not long after *Sze Tak-hung* was decided, the case of *Debbag and Izzet* [1991]12 Cr. App. R. (S). 733 came before the Court of Appeal in England. After conviction for drug offences the appellants had discussions with the police in the course of which they indicated willingness to supply information, but the assistance was not actually given until after they had been sentenced, some two months later. In the event it proved to be of no practical value and this was one factor in the decision of the Court of Appeal that no discount should be awarded. There was, however, another: namely that an offender should not, as the Court put it, be allowed to fight his corner until the last and only then, when faced with the sentence imposed upon him, seek a reduction from the Court of Appeal by offering help to the authorities. "The Court of Appeal could not readily countenance a system of what would amount to a negotiation after conviction and sentence for a reduction of sentence on the strength of lately volunteered information". This principle has recently been adopted and applied by the Court of Appeal (Lord Taylor CJ, Whaterhouse and Mitchell JJ) in *re X* [1994] Crim. LR 469 (Court of Appeal 93/3316/Y4), a more extreme case where the applicant had not offered any assistance until 15 months after conviction and sentence. Although in this instance the information had been of great value, the Court decided that any recognition of what he had done should be left to executive action. Although the facts of *re X* are distant from those which would have existed if Yip had been sentenced before rather than after giving evidence,

and *Debbag and Izzet* is not on all fours, it does appear that there may be some divergence between the practice of the two jurisdictions. The Board is not in a position to explore this, since the English cases were not cited in argument; and it is unnecessary to do so, since it was to the Hong Kong regime that Yip was subject. Their Lordships mention the point only to avoid any implication that by adopting an argument founded on *Sze Tak-hung* they are deciding that the position in England necessarily is or should be the same. For present purposes it need only be said that, taking the position in Hong Kong as it was when Yip was convicted, their Lordships regard the argument for the Crown as convincing.

Their Lordships turn to the grounds of appeal founded on the conduct of this particular trial. The first relates to the initiative taken by prosecuting Counsel in the murder to have the sentencing of Yip postponed. In their Lordships' opinion this intervention behind the scenes of the murder trial was ill-judged and should not be repeated, for by taking an active role in the disposition of criminal proceedings with which he was not concerned, and by doing so in the absence of his opponents, Counsel stepped outside his proper role as advocate in the adversarial conduct of the murder trial. Nevertheless if the prosecuting authority, rather than Counsel, had made it known in a more conventional manner that if Yip were to give evidence his assistance would be officially acknowledged, the decision of Yip's advisers to seek an adjournment, and of the Judge to grant one, so as to see what transpired, would almost certainly have been the same.

The next ground of objection concerns the sentencing of Yip, with all the inevitable publicity, before the trial of the appellant was complete. Although Gall J himself was in no way at fault, this is another unsatisfactory feature of the murder trial, for the failure by the authorities to prompt a further adjournment made the task of the jury and the Judge unnecessarily difficult, in two respects. Up to that point, attention had been focused on what if any were the promises made to Yip, and the expectations of Yip, in relation to the possible granting and possible extent of a discount when he came up for sentence; and this was right, for it was Yip's state of mind which the jury had to take into account when deciding whether his evidence was to be relied on. Knowledge that a substantial discount had actually been made might tend to point the jury in the wrong direction. Furthermore, the acknowledgement by Gall J that Yip had given help might lead an incautious jury to suppose that the authorities, and perhaps even Gall J, himself had accepted that the evidence was, in the words of the written immunity, full and true.

Nevertheless, although the sentencing of Yip at this crucial moment should not have been allowed to happen, the more particularly on the basis of a letter which emphasised the value which the prosecution placed on his evidence, the misunderstandings which might have ensued were capable of remedy by a clear and firm summing-up. Their Lordships are satisfied that this is what the trial Judge did furnish, and that no substantial injustice has been suffered.

Finally, exception has been taken to the absence of any communication to the appellant's representatives of the information furnished by the Director of Public Prosecutions in his letter to Gall J that Yip had been a reluctant witness. Whilst there is force in this complaint their Lordships cannot find that the omission made any practical difference. The jury cannot have overlooked, any more than Yip himself overlooked, that giving evidence for the prosecution in the circumstances which existed was a perilous business, and that a substantial inducement would be needed to overcome any apprehension which might understandably be felt. Such an apprehension was plainly revealed by the conversation to which Moa testified, in which Yip asked Moa to convey to the appellant the explanation that Yip was giving evidence against him only in the hope of improving his own desperate situation; and in the same conversation Yip had told Moa that he was undecided whether to give evidence,

which is inconsistent with any thought that he was completely content with the prospect. Even if a way had been found to put in evidence at the trial the prosecuting authority's assessment of Yip as a reluctant witness this would have added little if anything to the general picture of temptation to commit perjury which was already quite clear.

The imperfections rightly emphasised by Mr. Thomas Q.C. have led their Lordships to examine the record of the trial with particular care, but they can find no such unfairness, under whatever legal formula it might be described, as would justify their intervention. The considerations which put Yip's veracity in doubt were fully exposed throughout his evidence, the closing addresses of Counsel, and the direction to the jury. At the same time the learned Judge reminded the jury of a cardinal feature of Yip's evidence, without which this might be an altogether more anxious case, that the story of the appellant's confession was told to the police many months before the trial, at a time when Yip had not even committed the drug offences for which he was later to be sentenced. It is true, as the Judge was careful to point out, that this statement did not mention fresh blood on the appellant's bandage, or the explanation by the appellant that he had been in a fight, which Yip was to relate at the trial; but the existence of the earlier statement was enough to rule out the possibility that Yip had made up the entire story under the inducement of a lighter sentence. What if any reliance was to be placed on the evidence of Yip in all these circumstances was a matter for the jury to decide. In the opinion of this Board the appellant has suffered in no way from the absence of an application to the Judge to stop the trial, since the right course would have been to reject the application and leave the case to the jury, as he did.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be dismissed.